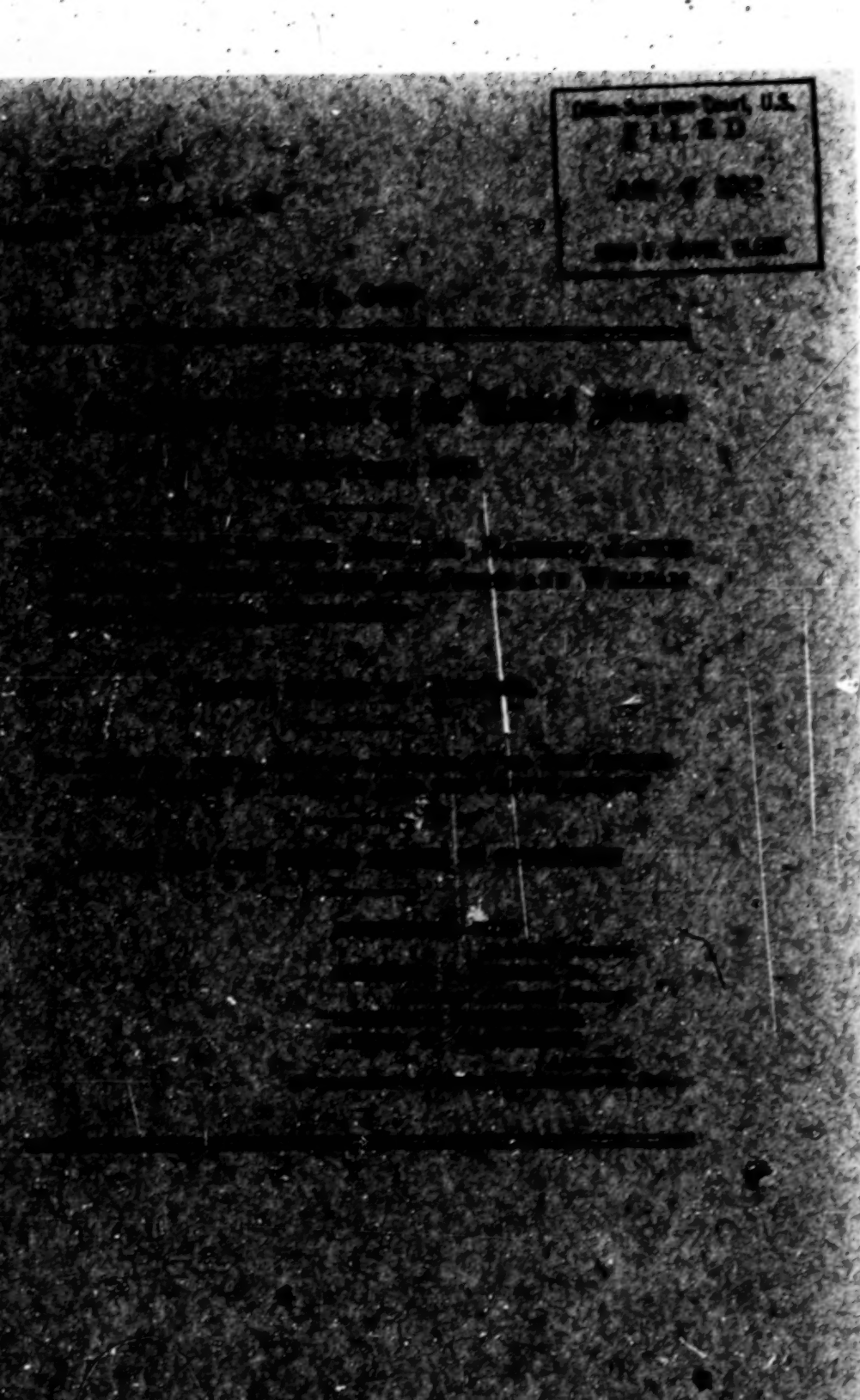

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 939

JAMES TERRELL KNIGHT, ROY LEE BARRETT, JACKIE HAMILTON GAINEY, CLEVELAND JOHNS AND WILLIAM PRENTIS TUCKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13–20) is reported at 297 F. 2d 675.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1962. A petition for a rehearing was denied on March 15, 1962. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to May 4, 1962, and the petition was filed on May 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals, in reversing the conviction of some of the petitioners for insufficiency of the evidence, properly remanded the cause for a new trial.

2. Whether the evidence sustained the jury's finding of a single conspiracy as to petitioners Knight and Johns.

STATUTES INVOLVED

United States Code, Title 28, Section 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

United States Code, Title 18, Section 371 provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

Petitioners and others were indicted in the United States District Court for the Middle District of Georgia for conspiracy to violate various statutes regulating the manufacture and sale of intoxicating liquor, during the period from February 15 to July 31, 1960 (R. 2–7). The court of appeals affirmed the convictions of petitioners Knight and Johns,[1] but reversed the convictions of Barrett, Gainey and Tucker for insufficiency of the evidence and remanded their cases for a new trial. Judge Tuttle dissented as to the reversal of Tucker's conviction, which he considered to be sustained by the evidence, but concurred otherwise in the opinion and judgment of the court (Pet. 20). The evidence may be summarized as follows:

1. On or about February 15, 1960, petitioners Knight, Johns and Tucker came to the home of co-conspirator Hodge near Pineview, Georgia. Knight proposed that they set up and operate jointly an additional still or stills, together with stills which each already had in operation. Hodge agreed (R. 40–44, 78, 104). Petitioner Johns, who worked for Knight, brought in materials (R. 45). New stills were constructed in the machinery shelter on Hodge's farm (R. 56, 65, 79–80), and were moved to a place on the Sheffield Farm, which Hodge had rented (R. 58–59, 67, 75), but were not put in operation before they were seized (R. 68–69, 125, 126).

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[1] Sentences of imprisonment as follows were imposed: Knight, five years; Johns, two and one-half years; Gainey, fifteen months; Tucker, a year and a day; Barrett, a year and a day (R. 225–230).

Knight and Johns brought sugar to the Hodge farm and hid it in the crib (R. 74). Johns also brought jars. He and co-conspirator Bruns helped jar up the product (R. 79). Knight made several visits to the Hodge farm and expressed dissatisfaction with the amount of output (R. 51, 80).

When the liquor was ready to be hauled, Knight furnished two cars for its transportation and told the drivers, co-conspirators Coley and Bruns, to follow him to a point on a dirt road, where delivery was later made (R. 81–82). Later, Bruns, Coley and Johns took another truckload to the Knight Truck Stop, where Johns and an unidentified person took over the truck. When they returned, the truck was empty (R. 111).

On another occasion, a government informer approached Knight about the purchase of whiskey. Knight said he was not dealing in whiskey at that time, but that he knew a man who might help. The informer gave Knight a penny with a cross scratched on it for the man to identify himself to the informer. The next day Johns presented the penny to the informer, following which two sales of illicit liquor were made by Johns to the informer. The purchase money of $200 and $184, respectively, was supplied from government funds (R. 149–153, 160–161, 166–168). Treasury Department investigator Williams, concealed opposite the Knight Truck Stop on the night of July 12, 1960, observed the informer drive off with petitioner Johns (R. 18). On July 14, from the same spot, he saw the informer and his wife drive in and pick up Johns. Then the informer and his wife came back alone and later met Williams at an appointed place. The in-

former had fifteen and a half gallons of non-tax-paid whiskey, which Williams destroyed (R. 19–20).

2. The evidence tending to implicate petitioner Tucker in the conspiracy was as follows: Co-conspirator Hodge testified that Tucker accompanied Knight to Hodge's house on February 15, 1960, when Knight proposed the construction of stills to be jointly operated by them (R. 42, 46–47). Tucker welded the stills, coming there, to the best of Hodge's recollection, twice between the middle and the last of February. Construction was in the machinery shelter back of Hodge's house (R. 56, 64–65). Johnny Coley, Jr., an employee of Hodge, corroborated this testimony, both as to Tucker accompanying Knight on his first visit to Hodge and as to Tucker welding the stills in the machinery shelter. Coley was uncertain as to Tucker's last name and referred to him as "Mr. Prentis" (R. 77–80, 84). Neither he nor Hodge recognized Tucker among those seated at the counsel table (R. 42, 104).

Mr. John K. Ramsey, of Detroit, Michigan, testifying for the defense, stated that Tucker was working for him as a truck driver from January to March 10, 1960, and that he saw him every week. He identified a loading ticket for 14 cases of flower bulbs, at Hoboken, New Jersey, dated February 16, signed by Tucker, and a similar ticket for cases of flower bulbs, dated March 3, 1960. He also identified a series of 18 checks dating from 1–16–60 to 3–6–60, expense and salary checks made out to Tucker, which he stated he personally gave to Tucker. He identified the indorsement (R. 185–188). On cross-examination, Ramsey stated that he had formerly lived in Macon, Georgia,

and had been convicted of a liquor offense in 1937 (R. 189–190). Charles Hawkins, a resident of Macon, testified that about March 10, 1960, he picked Tucker up at the Atlanta airport. Some time in January, he saw Tucker at a truck stop off Highway 1 in New Jersey (R. 191).

The evidence tending to implicate petitioners Barrett and Gainey was as follows: Investigator Williams testified that on March 25, 1960, he assisted in the arrest of Barrett, Gainey and Johns at the site of a still in Dooly County, which was reached through the yard of defendant Barlow. These three petitioners drove into the still yard in a truck loaded with butane gas cylinders (R. 9–10). The truck was a 1955 Dodge, which had previously been seen on several occasions at the Knight Truck Stop. It was then colored blue and white, but had been repainted black (R. 14). There was also evidence that Gainey was in a truck which drove up to the Knight Truck Stop, where Knight got out. Federal officers called him back and examined the truck, which carried butane gas cylinders and had wheat bran on the floor of the truck. The officers retraced the tracks along the dirt road, which led to a still back in the woods (R. 15–16, 25–32). It also appeared that Barrett was present in the machinery shelter on the Hodge farm when the stills were being put together (R. 72).

ARGUMENT

1. Petitioners Tucker, Barrett and Gainey, whose convictions were reversed, complain that the court of appeals remanded their cases for a new trial rather

than with directions to enter judgments of acquittal. On the record before it, the court of appeals properly left the question of retrial to be determined in the district court. The three petitioners whose convictions were reversed were sufficiently implicated with the others in the liquor violations so that the court of appeals could properly decide that a judgment of acquittal was not warranted. *Bryan v. United States*, 338 U.S. 552; *Forman v. United States*, 361 U.S. 416; *Yates v. United States*, 354 U.S. 298; cf. *Konigsberg v. State Bar*, 366 U.S. 36, 44. A new trial was one of the alternative forms of relief requested by petitioners. *Sapir v. United States*, 348 U.S. 373.

2. Petitioners Knight and Johns, whose convictions were affirmed, contend that the evidence showed three separate conspiracies and that they were prejudiced by the admission of evidence of conspiracies not within the jurisdiction of the division in which they were tried. The attempt to divide their activities into three separate transactions is artificial. Substantial evidence tended to show that the various activities were all directed by petitioner Knight from his truck stop in Wilcox County, which was within the jurisdiction of the district court hearing the case. Petitioner Johns was Knight's right-hand man, carrying out his orders, driving the truck, accompanying Knight at various times, and making the sale to the informer who had *theretofore contacted Knight*. As to Johns and Knight, the evidence amply shows a single overall con-

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[2] The United States Attorney has in fact decided not to retry the petitioners whose convictions were reversed (Tucker, Barrett and Gainey).

spiracy to engage in the illegal liquor business. Hence their convictions were properly affirmed even if the others were not implicated in the various aspects of the conspiracy. *Canella* v. *United States*, 157 F. 2d 470, 478 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1962.